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E I DU PONT DE NEMOURS AND COMPANY LEGAL PATENT RECORDS CENTER BARLEY MILL PLAZA 25/1122B 4417 LANCASTER PIKE WILMINGTON, DE 19805				KUMAR, VINOD
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ANTHONY JOHN KINNEY and GARY MICHAEL FADER

Appeal 2010-001838
Application 10/757,667
Technology Center 1600

Before DONALD E. ADAMS, DEMETRA J. MILLS, and
MELANIE L. McCOLLUM, *Administrative Patent Judges*.

ADAMS, *Administrative Patent Judge*.

DECISION ON APPEAL¹

This appeal under 35 U.S.C. § 134 involves claims 22-24, the only claims pending in this application. We have jurisdiction under 35 U.S.C. § 6(b).

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

STATEMENT OF THE CASE

The claims are directed to food. The claims have not been argued separately and therefore stand or fall together. 37 C.F.R. § 41.37(c)(1)(vii). Claim 24 is representative and is reproduced in the “Claims Appendix” of Appellants’ Brief (App. Br. 11).

Claims 22-24 stand rejected under 35 U.S.C. § 102(b) as anticipated by or, in the alternative, under 35 U.S.C. § 103(a) as obvious over Trueblood² or Staswick.³

We affirm.

ISSUE

Does the preponderance of evidence on this record support a finding of anticipation or in the alternative a conclusion of obviousness?

FINDINGS OF FACT⁴

FF 1. Trueblood teaches “vegetable oil (food) prepared from soybean seeds” (Ans. 5).

FF 2. “[S]oybean oil does not contain seed storage protein subunits like, glycinin or β -conglycinin” (*id.*).

FF 3. Soybean oil obtained from the process set forth in the claim appears to be identical to Trueblood’s soybean oil (*id.*).

² Trueblood et al., US 4,267,118, issued May 12, 1981.

³ P. E. Staswick and N.C. Nielsen, *Characterization of a Soybean Cultivar Lacking Certain Glycinin Subunits*, 223 ARCHIVES OF BIOCHEM. AND BIOPHYS. 1-8 (1983).

⁴ The evidence submitted as part of Appellants September 9, 2009 Reply Brief was not timely presented, was not entered into the record, and was not considered in our deliberations (*see* December 7, 2009 Advisory Action).

FF 4. Staswick teaches “soybean seeds having reduced levels of glycinin” (Ans. 7).

FF 5. Staswick’s “soybean seed storage proteins with reduced levels of glycinin would inherently constitute food” (*id.*).

FF 6. Staswick’s soybean seed storage proteins with glycinin levels appears to be identical to the soybean seed storage proteins with reduced glycinin levels obtained from the process set forth in the claim (*id.* at 7-8).

FF 7. The Kinney and Fader Declarations are presented in support of the claimed invention (App. Br. 5; Kinney Dec.⁵ 6; Fader Dec.⁶ 3).

FF 8. “Soy protein products fall into three major groups. These groups are based on protein content, and range from 40% to over 90%” (Soy Protein Products⁷ 3).

FF 9. Soy protein products “are: soy flours and grits, soy protein concentrates and soy protein isolates” (*id.*).

FF 10. A “soy protein product such as soy flour would have at least 40% protein” (App. Br. 6, citing Soy Flour⁸).

ANALYSIS

Appellants contend that “[c]laims 22-2[4] concern food comprising a soy protein prepared from transgenic soybean seeds prepared according to the methods recited therein” (App. Br. 5).

⁵ Kinney Declaration, executed June 29, 2001.

⁶ Fader Declaration, executed June 27, 2001.

⁷ Soy Protein Products, Characteristics, Nutritional Aspects and Utilization 3-6 (The Soy Protein Council, Washington, DC) (1987).

⁸ Soy Flour, www.soyfoods.org.

Trueblood:

Trueblood “concerns a process for treating crude soybean oil to make it a food or commercial grade quality” (App. Br. 6.; FF 1). Appellants contend that a food-grade soybean oil is not a soy protein product because it contains less than about 40% protein (App. Br. 6-7; Reply Br. 6-7). We are not persuaded.

There is no requirement in claim 24 that the food comprise a soy protein product (*Cf.* FF 9). Further, to the extent that a food within the scope of the claim would include a soy protein product, there is no requirement in the claim that a particular amount of soy protein product be included in the food. Accordingly, while a soy protein product (i.e., soy flour) may contain at least 40% soy protein there is no requirement in the claim that a *food*, prepared from soy flour, contain at least 40% soy protein.

Staswick:

Appellants contend that “food of the instant invention comprising a soy protein product as recited in the claims would be distinguishable by the presence of the chimeric gene used to create the transgenic soybean plant producing the seeds from which the soy protein products were obtained” (App. Br. 8; Reply Br. 9). There is no evidentiary basis on this record to support this contention.

CONCLUSION OF LAW

The preponderance of evidence on this record supports a finding of anticipation or in the alternative a conclusion of obviousness. The rejection of claim 24 under 35 U.S.C. § 102(b) as anticipated by or, in the alternative,

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under 35 U.S.C. § 103(a) as obvious over Trueblood or Staswick is affirmed.
Claims 22 and 23 fall together with claim 24.

TIME PERIOD FOR RESPONSE

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

cdc

E I DU PONT DE NEMOURS AND COMPANY
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BARLEY MILL PLAZA 25/1122B
4417 LANCASTER PIKE
WILMINGTON, DE 19805